



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 28 OF 2013**

**EDITH CHEWANJEL MASAI.....PLAINTIFF**

**VERSUS**

**FARID MOHSEN.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By a plaint dated **13/3/2013** and filed on the same date, the plaintiff sought the following orders against the defendant:-

- (a) **A declaration that the defendant was properly served with a Notice to Vacate the plaintiff's premises.**
- (b) **An order of eviction of the defendant, his agents, servants and/or family from the premises on Kitale Municipality Block 4/225.**
- (c) **Costs.**
- (d) **Any other relief this Honourable court may deem just to fit to grant.**

**PLEADINGS**

**The Plaintiff**

2. The plaint states that the plaintiff is the registered proprietor of **Kitale Municipality Block 4/225** on which stands a 3 bedroomed residential house occupied by the defendant herein; that on **28/9/2012**, the defendant was issued with a three (3) months' notice to vacate the said premises in order that the plaintiff renovate the same and convert it into her family residence and that despite the said notice the defendant has neglected, refused and/or failed to give vacant possession and is thus still occupying the said premises and neither has the defendant paid rent from **January, 2013** to date at **Kshs.10,000/=** monthly totaling to **Kshs.30,000/=**.

**The Defence**

3. The defendant filed a defence dated **19/4/2013** on **25<sup>th</sup> April, 2013**. He pleaded that he has not been served with a proper notice to vacate. He further pleaded that if proper notice was issued, he had no reason to refuse moving out. He denied that he is in rent arrears.

**The Reply to Defence**

4. The plaintiff filed a reply to defence on **8/5/2013** and denied the contents of the defence. He reiterated that a notice was legally issued requiring the defendant to give vacant possession of the plaintiff's premises by vacating the same as required to which the defendant neglected, refused and/or failed to comply and is in rent arrears.

**Agreed Issue**

5. On the final day of the hearing the parties agreed that the defendant had vacated the premises and that the only issue left outstanding was who should pay the costs of this litigation. This is an issue that can only be determined by examining the evidence of the parties.

**The Plaintiff's Evidence**

6. The plaintiff testified on **6/11/2013**. She stated that she has a three bed-roomed house on Plot No. **Kitale Municipality Block 4/225** which she bought in the year **2001** which is occupied by the defendant; that she allowed her brother to collect rental income for his purposes and her purposes; that the defendant has refused to pay rent and has left the house in a state of disrepair; that in **2010** her brother asked her to take over the collection of rent whereupon she asked the defendant not to pay rent to any other person. She also asked the defendant to pay three (3) months advance rent to her lawyer and the defendant agreed to that proposal but failed to pay; that her advocate wrote a letter dated **28/9/2012** demanding that the defendant ceases to deal with the plaintiff's brother which was received and responded to; that the response protested that the notice had been backdated; that at that point the plaintiff asked the defendant to move out of the house so that she could renovate it; that the plaintiff had tried to evict the defendant but later decided to file this case about 6 months after she first gave the defendant a notice to vacate. She stated that she wanted the defendant to move out of her house and pay rent arrears.

7. On cross examination she admitted that it is her brother who put the defendant into the possession of the premises and who used to collect the rent thereof. She denied that the defendant has been paying rent to her brother.

8. **PW2, William Kiptoo Sirma** testified on **20/1/2016**. He testified that he was the Land Registrar, Trans-Nzoia County and that the owner of Plot No. **Kitale Municipality Block 4/225** is the plaintiff. He produced a copy of the Lease as "**P. Exhibit 4**" and an extract from the Register as "**P. Exhibit 5**". He stated that the plaintiff is registered as the owner as at "**13/3/2013**". However upon re-examination he testified that the plaintiff was the owner of the land as at **1/10/2004** but was registered as lessee on **30/10/2013**.

9. **PW3, Charles Kilelu Musani** testified on **20/1/2016**; he stated the plaintiff is his younger sister; that she had asked him to look for a house for her; that she acquired the house while she was outside the country; that he takes care of her properties; that he leased out the suit premises to the defendant; that he is the one who bought the land for her in Kibomet and built a house for her there and that in return she gave him the suit premises to lease out and use the proceeds to educate his children. He produced a copy of tenancy agreement as **P. Exhibit 6** and stated that the defendant had a problem in paying rent regularly; that in **2013** he wrote a notice dated **19/12/2013** to the defendant to vacate the house which he produces as **P. Exhibit 7**; that the defendant failed to move out; that he went to his lawyer who wrote a letter dated **10/6/2014 (P. Exhibit 9)** demanding rent and another dated **16/7/2015** asking the defendant to move out (**P. Exhibit 10**). He prayed that the defendant be evicted from the house. He admitted that he is the one named as the landlord on the tenancy agreement dated **9/9/2010** and that the defendant had not known the plaintiff at the time the agreement entered into. Upon cross examination he admitted collecting rent upto **November, 2015** and that he had not terminated tenancy agreement. He stated that he has never declined to collect rent from the defendant.

#### The Defence Case

10. The defendant testified on **9/10/2018**. He did not dispute being a tenant in the suit premises. He concurred with **PW2** that it was **PW2** who was party to the tenancy agreement; that he however received a notice from the plaintiff requiring that he vacate the premises without stating any reasons for requiring him to vacate; that there was no notice that he would be sued; that he responded to the notice to vacate dated **28/9/2012** which he received on **4/12/2012**; that his response is dated **21/12/2012**; that after that no other notice was served on him; that the information regarding the need for renovation of the premises by the plaintiff had been conveyed to him before the case was filed; that he vacated the premises in **November, 2017**; that the plaintiff and her brother had their own dispute; that he is not claiming the ownership of the land but only that he was not given proper notice.

11. On cross examination he acknowledged a notice from Yano & Company Advocates dated **19/12/2013** on behalf of Charles Musani terminating the tenancy. He stated that he did not know who the owner of the premises was and that he relied on that notice as proof of ownership. He acknowledged further the lease dated **9/9/2010** was a period of one year which required a one month notice to terminate and that by the time the suit was filed the notice had expired yet he was in the premises. The lease was not renewed because after one year there developed trust and the tenancy just continued; that he took the notice from the plaintiff, gave it to her brother and her brother told him to stay on.

#### Submissions

12. The plaintiff filed her submissions on **24/10/2018** and the defendant on **23/10/2018**. I have considered the pleadings, the evidence and filed submissions.

13. The following findings of the court from the pleadings and the evidence of the parties:

- (a) That there was a lease dated **9/9/2010** between the plaintiff's brother and the defendant which was for a period of one year which required a one month notice to terminate;
- (b) That the lease dated **9/9/2010** was never renewed;
- (c) That a demand notice from the plaintiff dated **28/9/2012** was served upon the defendant requiring the defendant to vacate the premises;
- (d) That the defendant responded to that notice alleging that it was backdated and refused to vacate as he had not been given reasons for requiring him to do so;
- (e) That however the defendant intimated in his response dated **21/12/2012** that he would vacate;
- (f) That the defendant did not know or claim to know the owner of the property as at the time of taking up possession;

(g) That the land was registered in the name of the plaintiff as lessee on **30/10/13**;

(h) That the defendant received a notice of termination of tenancy dated **19/12/2013** from CK Yano & Co advocates on behalf of Charles K. Musani, demanding that he vacates the house for failure to pay rent within the agreed time; that notice demanded payment of **Kshs. 120,000/=** rent arrears and also the bills as at **31/12/2013** in default of which legal action would be taken against him;

(i) That another notice to vacate the premises dated **10/6/2014** was issued by Yano & Co Advocates;

(j) That yet another notice written by Charles Musani to the defendant was issued on **16<sup>th</sup> July 2015** giving the defendant **14** days to vacate the suit premises to pave way for renovation;

(k) That the defendant vacated the premises in **November 2017**;

(l) The lease had expired by the time the first demand to vacate was made.

**14.** In my view there was no evidence provided by the defendant that the plaintiff was not the owner of the premises as at the time of the execution of the lease or as at **4/12/2012** when he was served with the notice to vacate.

**15.** The plaintiff had right to issue a notice to vacate whether in her name or in her agent's name. It is the evidence of the plaintiff which is not controverted that he met with the defendant in Nairobi and informed him that she had taken over the premises and the collection of rent and that the defendant failed to pay rent to the law firm that she directed the defendant to; the defendant has not demonstrated that he enquired of the ownership of the premises at the time of the execution of the lease or that it mattered.

**16.** It is probable that the defendant got to know that the plaintiff and Charles Musani were siblings. The only reason that appears to have reared its head after the plaintiff issued the defendant with a notice was that, according to the defendant, "the notice was inadequate".

**17.** If adequate notice was the only reason why the defendant declined to vacate, the court fails to see any reason why the defendant stayed on *beyond* 30 days from the date of the receipt of the notice and also from the year **2012** to the year **2017** a greater portion the period during which the plaintiff was the registered owner.

**18.** The defendant has not demonstrated that there was any dispute between the plaintiff and Charles Musani over the ownership of the premises. In the court's view a dispute of the kind would have been probably formed a reason for non-payment of rent to the plaintiff, or failure to vacate the premises.

**19.** However even after the plaintiff was registered as the lessee to the premises the defendant still remained thereon and in my view this is proof that inadequate notice or ownership issue were not the cause of his refusal to vacate. Between the date of receipt of the notice and **13<sup>th</sup> March 2013** when this suit was filed is a period of about three and a half months. In my view that was a sufficient period for the defendant to make enquiries and establish the right of the plaintiff to demand vacant possession.

**20.** I find that the defendant had no reasonable cause to stay on in the premises beyond **4/1/2013**, being **30** days from the date he received the notice from the plaintiff unless he can show that the ownership of the suit premises by the plaintiff was disputed by Charles Musani. He has not shown any correspondence he wrote disputing the ownership rights of the plaintiff and her authority to demand that he vacate the suit land. If these had been exhibited this court could have spared him from meeting the costs of this suit.

**21.** Further, if he had vacated the premises this suit would have been unnecessary. Besides, his failure to vacate the premises despite later notices written by Charles Musani's advocate and after the plaintiff had acquired title to the premises shows that the defendant was intent only on harassing the plaintiff.

**22.** For those reasons I find that the costs herein should be paid by the defendant in full. I therefore enter judgment in favour of the plaintiff against the defendant and order as follows:

**(a) The defendant occasioned the institution of this suit by his wilful conduct and he shall pay to the plaintiff the full costs of this suit to be agreed on or to be taxed in default of any agreement thereon.**

It is so ordered.

Dated, signed and delivered at Kitale on this **30<sup>th</sup>** day of **October, 2018**.

**MWANGI NJOROGE**

**JUDGE**

**30/10/2018**

Coram:

Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the parties

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**30/10/2018**